

ORIGINAL

IN THE SUPREME COURT OF OHIO

REGIS F. LUTZ, et al.,	:	Supreme Court
	:	Case No. 2015-0545
Plaintiffs-Respondents,	:	
	:	On Review of Certified Questions
vs.	:	From the United States District Court,
	:	Northern District of Ohio,
CHESAPEAKE APPALACHIA, L.L.C.,	:	Eastern Division
	:	
Defendant-Petitioner.	:	Case No. 4:09-cv-2256

REPLY BRIEF OF BRUCE M. KRAMER *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

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Although I have filed several amicus curiae briefs over the years, I have never felt compelled to file a reply amicus brief but in light of Respondents' attorneys *ad hominem* and scurrilous attack on my personal and intellectual integrity I feel it necessary to respond. My response is limited to the material contained in that part of Respondents' Merit Brief entitled "Respondents Sixth Proposition of Law" contained on pages 25-26 of said brief.

Respondents' attorneys accuse me of not understanding the different roles that are played by an attorney who is acting as an expert and an attorney who is acting as an advocate. I strongly disagree with that characterization which is somehow based on a fragment of a longer paragraph that I had written in a law review article.¹ The context of that sentence was a discussion of the difficulty that the Texas Supreme Court was having in interpreting some boilerplate provisions of sulphur royalty clauses contained in oil and gas leases. The sentence about "disparate results" followed from the court's treatment of the form clauses as being ambiguous so as to allow for the admission of parol or extrinsic evidence.² It is not a statement that can support the respondents' attorneys statement that I believe that the "role of an expert. . . [is] to persuade judge and jury to the 'correctness' of the position of the party that hires the expert." My role as an expert is to provide evidence as to the custom and practice of the industry relating to the use of written instruments and to provide an understanding of what various "terms of art" mean also within the context of the custom and practice of the industry. It is not, as respondents' attorneys state, to persuade a judge or jury as to how a particular written instrument should be interpreted or applied.³ In acting as an "expert" and not an "advocate" in another

¹ The respondents' attorneys do not even provide a pinpoint cite for my law review article, thus requiring the court and a reader to hunt through the entire article since the quotation is from the last page. Bruce M. Kramer, *Royalty Interests in the United States: Not Cut from the Same Cloth*, 29 Tulsa L.Rev. 449, 484 (1994).

² 29 Tulsa L.Rev. at 479-484.

³ Respondents' attorneys while referring to the jury's verdict in *Pollock v. Energy Corp. of America*, do not mention that the magistrate judge who heard all of the motions and the jury trial had issued an earlier opinion/recommendation where he cited to my declaration and additional declaration in reaching his decision on an

matter before the United States District Court for the Western District of Pennsylvania, Chief Judge Conti first stated that: "Kramer testified about the customs and practices of the oil and gas industry with respect to leasing." *Mason v. Range Resources--Appalachia, LLC*, 2015 U.S. Dist. LEXIS 97471 at FOF 86 (W.D. Pa. July 27, 2015). She then went on to state: "The testimony of Kramer about the customs and practices of the oil and gas industry with respect to leasing is creditable and helpful." *Id.* at FOF 99. Furthermore in both *Pollock* and *Mason*, the courts cited extensively to Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* (2015).

Respondents' attorneys state: "In recent years, he has regularly appeared in court as an expert for the defense in gas royalty cases." That statement is patently false. I did appear in the case of *Pollock v. Energy Corp. of America* in the United States District Court for the Western District of Pennsylvania. Other than *Pollock*, however, I have not appeared in any merits-based royalty litigation in the past 25 years. I have testified and provided expert reports at the class certification stage for royalty claims, which is the basis for my review of thousands of oil and gas leases, but the issues I reported on and testified to related to the different language used in the royalty clauses within the putative class definition. In those situations I did not testify as to how a specific royalty clause or language contained within a royalty clause should be interpreted but only that the leases I reviewed contained widely disparate language that might create different royalty payment or delivery obligations.

issue relating to the commingling of natural gas after production. *Pollock v. Energy Corp. of America*, 2012 U.S. Dist. LEXIS 186089 at 15-19 (W.D. Pa. Oct. 24, 2012). Not surprisingly, the respondents' attorneys also do not cite to the Magistrate Judge's reference to me as an "acknowledged scholar in oil and gas jurisprudence." *Id.* at 18. In addition, the respondents' attorneys do not refer to an earlier decision of the Magistrate Judge who held that the leases at issue in *Pollock* were the type of leases where the royalty could be calculated using the same netback methodology that Chesapeake argues for here. *Pollock v. Energy Corp. of America*, 2011 U.S. Dist. LEXIS 93616 (W.D. Pa. July 27, 2011).

Nowhere in the remaining portions of the Respondents' Merit Brief do they challenge any of the statements or positions taken by me in my amicus brief.⁴ Most notably, they never offer any interpretation at all of what the parties meant when they agreed to base royalties on the value of the gas "at the well." Instead they attempt to assassinate my character as well as the veracity of the work that I have co-authored with Professor Patrick Martin since 1996.

Respondents' attorneys cite a lengthy excerpt from a book written by John Burritt McArthur that criticizes Professor Martin and myself because we do not hew to his firm belief that the implied covenant to market as applied to royalty clauses should be given independent status.⁵ He also implies that the current authors have diminished the credibility of the *Williams and Meyers* treatise because we have either represented producers or testified as experts for producers. I strongly disagree with the respondents' attorneys claim that Professor Martin and I have strayed from the straight and narrow and have sullied the reputation of our predecessors. Nothing could be further from the truth.

As was done by Professors Williams and Meyers, the current co-authors provide a comprehensive and objective view of every case that has been decided that has an impact on oil and gas jurisprudence. Likewise, as was done by Professors Williams and Meyers, in addition to providing that comprehensive and objective view, the co-authors will additionally and explicitly

⁴ I authored an amicus brief in *Kilmer v. Elexco Land Services*, 605 Pa. 413, 990 A.2d 1147 (2010) that deals with the same issue as in *Lutz*. The Pennsylvania Supreme Court noted my amicus brief, 605 Pa. at 427, cited to the *Williams and Meyers* treatise, 605 Pa. at 429-30, and used the historical information I provided in the brief to help it reach a decision that in 1979 when the statute at issue was enacted, the vast majority of sales of natural gas took place at the well.

⁵ Mr. McArthur ignores the fact that Professors Williams and Meyers were the parties who, quite appropriately, discussed oil and gas cases impacting the express royalty clause in the sections of the book devoted to the purpose of explaining the major clauses in oil and gas leases. Unlike many of the major subjects of implied covenants, every oil and gas lease that I have read has an express royalty clause that sets forth the fraction of the royalty to be paid, whether the royalty is a delivery obligation (in kind) or a payment obligation, and if a payment obligation how that obligation is to be calculated. It was most likely Professor Williams who placed in Section 645.3 of the Treatise the pre-1996 cases that form the basis for Mr. McArthur's thesis regarding the implied covenant to market. Professor Martin and I agree with Professor Williams' structure and organization because all oil and gas leases contain express royalty clauses.

criticize certain opinions and make policy statements about what the law should be. Professor Meyers, who was principally responsible for writing what is now Volume 5 of the Treatise dealing with implied covenants put in several lengthy sections of the implied covenant of further exploration. Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* §§ 841-847. Professor Meyers was a strong proponent of such an implied covenant even though at the time that Volume 5 was written most of the decided cases did not agree with him. See Charles Meyers, *The Covenant of Further Exploration: A Comment*, 37 Tex. L.Rev. 179 (1958); Charles Meyers, *The Implied Covenant of Further Exploration*, 34 Tex. L.Rev. 553 (1956). Section 847 of the Treatise, in its entirety, is an analysis of the wisdom of adopting such an implied covenant.⁶ The final two pages of Section 847 is Professor Meyers' opinion that courts would be better off if they adopted the implied covenant of exploration.⁷

The Treatise is first and foremost a comprehensive treatise on oil and gas law covering both judicial and legislative developments in an objective and non-biased manner. As the Third Circuit noted in *Smith v. Steckman Ridge, L.P.*, 590 Fed. Appx. 189, 193 (n.4) (3rd Cir. 2014): "*William[s] and Meyers, Oil and Gas Law*, along with its *Manual of Oil and Gas Terms*, is arguably the foremost authoritative treatise on the law relating to oil and gas." Mr. McArthur's criticism of the Treatise's failure to organize and present the cases in a way that he posits does not support the respondents' attorneys conclusion that: "the treatise has transitioned toward

⁶ By looking at a hard copy of the Treatise one can determine that Professor Meyers wrote Section 847 in 1964 with later changes in 1980. When Professor Martin and I took over the editorship in 1996 we left Section 847 largely as it was written by Professor Meyers.

⁷ A similar policy choice as to how courts should resolve an oil and gas issue is reflected in § 222 written by Professor Williams. In § 222, Professor Williams "suggests the following conclusions. . ." and then goes on to state that the severed mineral owner should receive a compensation payment made by the government or an entity possessing the power of eminent domain for purposes of subsurface storage of natural gas rather than the severed surface owner. Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* § 222 (p. 335-6) (2015). Professor Williams also took the position that certain types of oil and gas-related interests should not be invalidated under the Rule Against Perpetuities because modern commercial transactions should fall outside of the purview of the Rule. *Id.* at § 325 (p.64-5).

advocacy under its current editors." The *Williams and Meyers* treatise is still the most widely-cited multi-volume oil and gas treatise in the United States. It provides the reader with an objective view of oil and gas law as pronounced in federal and state court opinions.⁸

It is rare to see in a brief a personal, *ad hominem* attack on the author of an amicus brief. This attempt to smear the author's reputation and the credibility of a treatise that has been widely cited and relied on by state and federal courts for the past 50 years should not influence the court's resolution of how Ohio would apply a royalty provision where the parties agreed to calculate royalties on the value of gas at the well.

⁸ A case cited frequently by the respondents' lawyers for using the implied covenant to market to adopt the "first marketable product" doctrine, *Rogers v. Westernman Farm Co.*, 29 P.3d 887 (Colo. 2001), contains eleven different citations to the Treatise. The opinion was issued five years after Professor Martin and I took over the authorship of the Treatise.

DATED: October 13, 2015

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bruce M. Kramer". The signature is written in a cursive style with a horizontal line underneath it.

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